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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 1207

C. G. WILLIS, INC.,
Claimant of Barge BERTIE
and Tug EVELYN,

Petitioner,

v.

LATHAM B. HEWLETT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Latham B. Hewlett, respectfully prays that a Writ of Certiorari be denied to the Petitioner, C. G. Willis, Inc., and states that the Final Judgment entered by the United States Court of Appeals for the Fourth Circuit, entered in this matter on November 28, 1969, is plainly right.

QUESTION PRESENTED

What is the proper measure of damage to the Barge

BA-1401, the lowest estimate for repairs being $2,895.00?

STATEMENT OF THE CASE

The Barge BA-1401 was moored to a pier on September 28, 1960, when the Tug Evelyn and Barge Bertie damaged the Barge BA-1401. The Petitioner, C. G. Willis, Inc., admits liability and thus the question of liability and causation were admitted by the Petitioner. The only issue is the amount of damages. The Petitioner admits to having damaged Barge BA-1401, to the extent of $1.00. The lowest estimate for the repair of Barge BA-1401 as testified to, was $2,895.00. The Admiralty Court awarded $1.00 by way of nominal damages. To that Judgment the Respondent here appealed and the United States Court for the Fourth Circuit reversed and entered Judgment for $2,895.00.

In reversing the trial court, Circuit Court Judge Bryan stated as follows:

> "Our concern is the acceptance by the instance court of the respondent's defense to the damage claim, i.e. 'the barge was a constructive total loss and that no real or actual damages have been shown, thus restricting the recovery to nominal damages'. The decree on review purports to fix 'nominal damages', but this is in reality a dismissal of the libel, for admiralty does not recognize nominal damages. *Herbst* v. *The Asiatic Prince*, 97 Fed. 343, 345 (SDBY 1899, opinion by Judge Addison Brown). Presently, the Court stated, 'We find no precedent for allowing damages where a vessel, deemed a constructive total loss, suffers still further damage.' Apparently, the award of $1.00 was the product of this proposition. It is, we think, an untenable postu-

late; if accepted, it could result in unjust deprivations."

* * * * * *

"'Restitutio in integrum' is the precept in fixing damages, and 'where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred. . .' The Baltimore, 75 U.S. 377, 385 (1869)."

* * * * * *

"When, as here, the tortfeasors assert that the value is less than the cost of repairs, they have the burden to establish that fact. The respondents have failed to do so. Consequently, the case stands on the proof of the repair costs, and the libellant is entitled to a decree in that amount.

"The District Court made no finding of value. It merely found that the BA-1401 had no value save for sale as scrap, but this is not the equivalent of fixing a figure of value. Moreover, it is erroneous. It is refuted by the other uncontested findings of her continuing utility."

* * * * * *

"'It may be that property destroyed or lost has no market value . . . it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely.' Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752, 755-56 (1906). If there is no market value, other indicia of value must be looked to. Standard Oil Co. v. So. Pacific Co., 268 U.S.

146, 155 (1925); The President Madison, 91 F. 2d 835, 845 (9 Cir. 1937); The I. C. White, 295 Fed. 593, 595 (4 Cir. 1924). Among other factors is the use value to the owner. As was said in Bishop v. East Ohio Gas Co., 143 Ohio St. 541, 56 N.E. 2d 164, 166 (1944):

'Market value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner. This doctrine is a recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market.'

'See, too, ALR2d 911, 913.'

"Even if the cost of repairs be limited to the *diminution* in value of the ship rather than to her entire value, our decision would, for at least two reasons, not be different. The first point of our conclusion here is that no such values were proved. Beyond that, however, the second point is that in admiralty, the cost of repairs is the equivalent of value-mininution. 'Damage less than total loss is compensated by reference to cost of repairs. . . .' Gilmore & Black, Admiralty, 436; Pan-American Petroleum & Transport Co. v. United States 27 F 2d 684, 685 (2 Cir. 1928)."

The Respondent states that Barge BA-1401 had no fair market value but it had a utility value in accordance with the evidence. The Barge was used and

was insurable. Restitution and compensation is the rule in all cases where repairs are practicable. That of course is what Latham B. Hewlett, Respondent, desires in this case, that the Barge be put in the exact condition that it was prior to the collision. *Rodi* v. *Dean,* 138 F. 2d 309 (1944); *O'Brien Bros.* v. *The Helen B. Moran,* 160 F. 2d 502 (1947).

As stated by Judge Bryan in his majority opinion:

> "To illustrate, although an automobile through age or misfortune may have no value in the market save for scrap, and although still another nick in its paint or shape may not appreciably reduce the usefulness or dollar-value of the car, nevertheless its checkered career and disreputable appearance do not assure absolution to one who negligently further scars the vehicle. The owner is entitled to have the automobile free of even that dent. De minimis non curate lex does not, semble, apply to damages but only to injury. Fullam v. Stearns, 30 Vt. 443, 455 (1857)."

Is there a conflict between the United States Court for the Fourth Circuit and the United States Court for the Second Circuit?

Many cases cited by Judge Bryan with approval were cases decided by the United States Court for the Second Circuit.

Another case deciding the issues herein is *The Nyland,* 164 Fed. Supp. 741 (1958). It was held that where a vessel is a total loss the measure of damages is the value of the ship at the time of loss. If the loss is not total, the measure is ordinarily the reasonable expense of repairing the ship, to extent sufficient to put her in as good condition as she was before the collision, plus

a reasonable allowance for the loss of use. It is not necessary that the repairs be actually made, but the repairs must not exceed the value of the ship as she was before the injury, and must be less than the diminution in market value due to the injury, unless the ship has some special value to her owner greater than her value to others.

In *Rodi* v. *Dean*, 138 F. 2d 309, (1944), it was held that where it appeared that the vessel which sank in the collision was a pleasure boat and there was little, if any, market for boats of such class, and it also appeared that there was not a total loss, damages were properly measured by estimated cost of repair rather than market value. This is an interesting case because it is somewhat similar to the situation we have with Barge 1401. The pleasure boat had a value, but probably had no fair market value as there could not be found a willing buyer and a willing seller, which, of course, determines the fair market value.

Respondent submits that there does not appear to be a conflict between the Circuits.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:
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